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Supreme Court of the United States

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,

Appellant,

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY and JOHN M. HANCOCK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT S. H. KRESS & COMPANY

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BRIEF FOR RESPONDENT S. H. KRESS & COMPANY

Opinion Below

The opinion of the District Court (R. 71) is unreported at this time.

Jurisdiction

The final judgment of the District Court was entered on August 29, 1952 (R. 75, 77). The petition for appeal was presented and allowed on October 27, 1952 (R. 94-95).

Probable jurisdiction was noted on February 2, 1953 (R. 104). The jurisdiction in this Court is invoked by the Government under Section 2 of the Expediting Act of February 11, 1903 as amended, 62 Stat. 989, 15 U. S. C., Supp. V, Section 29.

Questions Presented

The District Court decided that this action, brought pursuant to Section 8 of the Clayton Act (15 U. S. C., Sec. 19) to enjoin and restrain an interlocking directorship, became moot when the interlocking directorship ceased, with assurances by the director to the Court that he did not intend to renew it. The questions presented on this appeal are:

(1) Whether the District Court erred in determining that this action to enjoin the interlocking directorship, allegedly in violation of Section 8 of the Clayton Act, is rendered moot because of the termination of the interlocking directorship with assurances against renewal.

(2) Whether Section 8 is directed against the corporation on whose board the interlocking director is a member and whether the corporation can be ordered to prevent a recurrence of the interlocking directorship.

(3) Whether the District Court has jurisdiction of actions bronght under Section 8 or whether jurisdiction is exclusive in the Federal Trade Commission by reason of Section 11 of the Clayton Act. (This question will be discussed in the brief of some of the other respondents, but will not be discussed in this brief.)

Statute Involved

The Act of October 15, 1914, Ch. 323, commonly known as the Clayton Act, Sections 15 and 8, 38 Stat. 736 and 732, as amended, the pertinent parts of which read as follows:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 12, 13, 14-21, and 22-27 of this title, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof." 15 U. S. C., Sec. 25.

"* * * No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to

chapters 1 and 8 of Title 49, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of sections 12, 13, 14-21 and 22-27 of this title it shall be lawful for him to continue as such for one year thereafter." * * * 15 U. S. C., Sec. 19.

Statement of the Case

This is an appeal by the Government from the judgment of the United States District Court for the Southern District of New York, dismissing the complaint in Civil Action 73-296, entitled *U. S. A.* v. *W. T. Grant Company, S. H. Kress & Company and John M. Hancock* (R. 75-77). The action is one of three related actions brought pursuant to Section 15 of the Clayton Act to prevent and restrain alleged violations of Section 8 of the Clayton Act. The complaint alleges an interlocking directorship in violation of Section 8, created by John M. Hancock's simultaneous membership on the Boards of Directors of S. H. Kress & Company (hereinafter referred to as "Kress") and W. T. Grant Company (hereinafter referred to as "Grant") (R. 1-3). The Government requests a decree stating that the defendants have violated Section 8; that John M. Hancock (hereinafter referred to as "Hancock") be ordered to resign from the Board of Directors of Kress or Grant, or both; that Hancock be perpetually enjoined from becoming

a director or serving as a director in any two or more corporations engaged in interstate commerce and meeting the capital requirements of Section 8; that the company or companies from whose board Hancock is requested to resign be compelled to accept his resignation and be enjoined from permitting him to be elected as a director or allowing him to serve as such in the future; and that both Kress and Grant be perpetually enjoined from permitting to be elected or allowing to serve as a director on their boards any person who at the same time is a director of a competing corporation engaged in interstate commerce (R. 3-4).

The complaints were filed on February 27, 1952 (R. 1), and the summons and complaint were served on Kress on February 29, 1952.

It is shown by the affidavit of O. V. M. Hawkins, a Vice President of Kress, in support of Kress's motion to dismiss, that

> "On March 11, 1952, defendant Hancock resigned as a director of S. H. Kress & Company and has since sold his stock in the Company and returned to the Company his files of Company matters, and has completely disassociated himself with defendant Kress" (R. 17).

It is further shown from the supplemental affidavit of O. V. W. Hawkins that on March 4, 1952, by action of the Board of Directors of Kress, the number of directors on its board was reduced from eight to seven, effective as of the date of the next shareholders' meeting, which was May 13, 1952, and that at that shareholders' meeting a Board of Directors was elected which did not include Hancock (R. 24-25).

Written interrogatories were received by Kress on April 3, 1952 from the Government inquiring as to all of the items handled by Kress stores and inquiring into a number

of details with respect to each item, and further inquiring as to the length of time that Hancock has been on Kress's board and what the other Kress directors knew about his directorship on the board of Grant (R. 8-11).

It is shown by the affidavit of John M. Hancock in support of his motion to dismiss that for some five years prior to the commencement of this action the Department of Justice had been discussing with Hancock and his attorneys the question of whether his presence on the boards of both Kress and Grant violated Section 8 (R. 20-21). It appears from the affidavit of O. V. W. Hawkins that at no time during this discussions did the Department of Justice call Kress into these conferences or notify it that such conferences were proceeding or that it claimed that Kress had violated or was violating Section 8 (R. 17).

Hancock's affidavit states:

> "* * * on March 11, 1952, I resigned from the Board of Directors of S. H. Kress & Company, thus terminating my concurrent directorship in that company and W. T. Grant Company."
>
> * * * *
>
> "I have, of course, no intention of ever going back on the Board of Directors of S. H. Kress & Company as long as I remain a director of W. T. Grant Company. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do" (R. 21-22).

Kress moved to dismiss the complaint on the ground that the controversy was moot; that Section 8 is addressed

to an individual who is a director and not to a corporation; and that the authority to enforce compliance with Section 8 is vested in the Federal Trade Commission and not in the District Court (R. 15-16). Judge Conger decided that the case was moot and dismissed the complaint on that ground without considering the other grounds (R. 72-77).

Summary of the Argument

I. The object of this action is to terminate what is alleged to be an existing and threatened future violation of Section 8 caused by Hancock's simultaneous directorship on the Boards of Kress and Grant. This object has been attained by the Government by reason of Hancock's voluntary resignation from the Board of Kress with his assurance that he has no intention of ever going back on the Board of Kress while still serving as a director on the Board of Grant. The promptness with which his resignation was made and the actions of Kress with respect thereto all give ample assurance that no future violation of Section 8 is threatened by any of the parties hereto. The District Court, therefore, properly dismissed the complaint on the ground that the case is moot. The fact that the Government has asked for relief amounting to an injunction against all violations of Section 8 and which is broader than any relief that the Government is entitled to and the fact that the Government would like to have a legal decision for its guidance in other future cases do not render the present case any less moot.

II. Even if the case were not moot, the Government's sole relief is against the individual director and no relief can properly be had against the corporation because Section 8 is a prohibition directed against the director only and because the corporations have no power or authority to prevent a violation of Section 8. The complaint should,

therefore, have been dismissed in any event in so far as it seeks to obtain relief against Kress, one of the corporations.

POINT I

Hancock's resignation from Kress's Board of Directors renders this case moot and the complaint was properly dismissed.

(A) The District Court properly held that the present case became moot upon termination of Hancock's directorship in Kress.

The object of this action is to enjoin an alleged violation of Section 8 of the Clayton Act, resulting from Hancock's simultaneous directorships on the Boards of Directors of Kress and Grant. There is no question but that the alleged interlocking directorship has ceased. The case has, therefore, become moot and the District Court properly dismissed the complaint.

This Court has repeatedly held that where an illegal activity has ceased with no reasonable expectation of its renewal, the case becomes moot and there remains no controversy for the Court to decide. *Standard Oil Co.* v. *United States*, 283 U. S. 163, 181, 182; *United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *United States* v. *Hamburg-American Co.*, 239 U. S. 466. See *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416.

In the *Standard Oil Co.* v. *United States*, 283 U. S. 163, 181, 182, this Court stated the principle as follows:

> "The remaining issues in the case have become moot. The Government objected to a number of early Indiana Company licenses which contained certain territorial restrictions on the production of cracked gasoline; and also to a provision in the first contract be-

tween primary defendants, and in licenses thereunder, by which the Indiana Company secured an option to purchase a portion of the cracked gasoline manufactured in, or shipped into, its sales territory. At the hearing before the District Court it appeared that these provisions had never been enforced. Upon the court's request the objectionable clauses were voluntarily cancelled some months before the entry of the decree. Similarly, the propriety of certain blanket acknowledgments of patent validity in the first contract, and in a number of licenses under later contracts, was questioned by the lower court. At its suggestion, these provisions also were formally cancelled by the parties. As the relief here sought is an injunction, and hence relates only to the future, *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, the alleged validity of such provisions has become moot. *Berry* v. *Davis*, 242 U. S. 468; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Alejandrino* v. *Quezon*, 271 U. S. 528; *United States* v. *Anchor Coal Co.*, 279 U. S. 812."

If, however, there is a threat of renewed violation, the Court may, in its discretion, issue an injunction against future violations. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307-310, and *United States* v. *Aluminum Co. of America*, 148 Fed. (2d) 416, 448 (C. A. 2d). In the latter case, Judge Learned Hand stated the principle as follows:

"* * * The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case or controversy' may remain to be disposed of. There are plentiful authorities so holding [cases cited]. To disarm the Court it must appear that there is no reason-

able expectation that the wrong will be repeated." *United States* v. *Aluminum Co. of America*, 148 Fed. (2d) 416, 448.

The grounds for the jurisdiction to issue an injunction in such a case are not the past violation. Injunctions relate to the future only and do not have for their purpose the punishment of past acts. *Standard Oil Co.* v. *United States*, 283 U. S. 163, 182; *Walling* v. *T. Buettner & Co.*, 133 Fed. (2d) 306 (C. A. 7th), cert. den. 319 U. S. 771. The mere suspicion of the possibility of future violation is not sufficient to constitute a justiciable controversy so as to prevent the case from being moot. *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Walling* v. *T. Buettner & Co.*, 133 Fed. (2d) 306 (C. A. 7th), cert. den. 319 U. S. 771. It follows that the Government does not show a controversy in the present case merely by showing that there was an interlocking directorship in the past. It must show a situation presently existing which constitutes a threat of a repetition of the interlocking directorship complained of.

An analysis of the cases cited by the Government shows the sort of presently existing threat that will create a controversy that prevents the case from being moot upon cessation of the violation complained of.

In *United States* v. *Trans-Missouri Transportation Co.*, 166 U. S. 290, the Court noted at pages 308 and 309:

> "As an answer to the fact of the dissolution of the association, it is shown on the part of the Government that these very defendants, or most of them, immediately entered into a substantially similar agreement, which was to remain in force for a certain time, and under which the companies acted, and in regard to which it does not appear that they are not still acting."

It further appeared that the combination complained of in the *Trans-Missouri* case did not cease until after the judgment of the Court below which upheld the validity of the agreement, and the holding of this Court was that the cessation of the activity by the defendants after the judgment could not prevent the review by an appeal of the lower Court's holding in the combination's favor.

In *Federal Trade Commission* v. *Goodyear Tire & Rubber Company*, 304 U. S. 257, it was held that the Court of Appeals had jurisdiction because the Federal Trade Commission had issued a cease and desist order against Goodyear, which this Court said continued to be effective even though the statute upon which it was based had been revised. The holding was that the existence of that order, which Goodyear continued to be subject to and which the Commission could have enforced at any time, created a sufficient controversy so that Goodyear was entitled to have it reviewed by the Court of Appeals.

In *Walling* v. *Helmerick & Payne*, 323 U. S. 37, 42-43, the District Court and the Circuit Court had decided that the activity complained of was lawful. The agreement complained of had been discontinued during the trial of the case in the District Court without any promise not to revert to it. Therefore, this Court said that it would have to reverse the lower courts, otherwise the defendant would be free to go ahead and continue the illegal activity with the blessing of the lower courts.

In *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, the question was whether the Court of Appeals could enforce an order of the National Labor Relations Board requiring an employer to bargain in good faith with a union. It appeared that, although the employer claimed to be bargaining in good faith, the fact was that no agreement had been reached with the union because of what the employer termed the union's arbitrary attitude.

It is quite obvious, of course, that the fact that an agreement had not been reached raises the question whether the employer was bargaining in good faith.

McGrain v. *Daugherty*, 273 U. S. 135, 182, *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514-516, *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452, *Local 74 United Carpenters and Joiners* v. *National Labor Relations Board*, 341 U. S. 707, 715, and *Porter* v. *Lee*, 328 U. S. 246, 252, all presented the same kind of a situation. In each, the unlawful activity had been temporarily suspended, not by voluntary action of the defendant, but by some factor beyond his control. In each, the factor that suspended the violation was merely temporary and renewal of the prohibited activity was not only to be expected but was almost certain. For example, *Local 74 United Carpenters and Joiners* v. *National Labor Relations Board*, 341 U. S. 707, 715, concerned an unfair labor practice by a labor union. The union was picketing a store that installed carpets in private homes, employing non-union labor. In that case, carpet was being installed in a private home that was being renovated by union carpenters. The union picketing the store also picketed the private home, causing the union carpenters to quit the job. The home owner managed to get the renovation finished by hiring union labor without the knowledge of the union and with the completion of the renovation the picketing complained of stopped. The Court said that the picketing of the house was merely a sample of the continuing union activity that was certain to reoccur. In all these cases, the defendant remained adamant so that the underlying controversy continued and the situation remained such that it was to be expected that the prohibited activity, or something very much similar to it, would reoccur.

The present case presents none of the situations that created the continuing controversies in the foregoing cases.

It rather presents a situation where the activities complained of have ceased voluntarily in good faith, and the court has been assured that they will not be renewed. The District Court did not rule on the validity of the directorship. It merely held that the question need not be considered because it no longer had substance.

Within two weeks after the service of the summons and complaint in the present action, Hancock resigned from the Board of Directors of Kress and he has assured the court that he had no intention of going back on Kress's Board (R. 21, 22). Thus, the directorship alleged to be in violation of Section 8 has unquestionably ceased.

There is no real threat of a future violation of Section 8 by Kress. The affidavit of O. V. W. Hawkins shows that Hancock was not re-elected to the Kress Board and that he has returned to Kress his files and company matters and has completely disassociated himself with Kress (R. 16-18). Further, Hancock in his sworn statement states that he does not intend to go back on the Board of Kress while he is on the Board of Grant (R. 22), and he cannot be reelected to Kress's Board without his consent, thus assuring compliance by Kress's shareholders. Further assurance by Kress would add nothing because Kress's shareholders—not Kress—are responsible for the election of Kress's directors.* It is not alleged or shown that Kress contemplates or threatens to allow Hancock back on its Board or to allow anyone else on its Board whose membership on that Board would constitute a violation of Section 8 of the Clayton Act.

Both Grant and Kress have their securities listed on the New York Stock Exchange and are subject to the Securities Exchange Act of 1934. As a result, the election of their directors is made public in reports to the Securi-

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* See *infra*, pp. 25-26.

ties and Exchange Commission. This publicity given to the election of their directors is further assurance against Hancock's renewed directorship in Kress.

Considered in the light of the history of Section 8 and the Government's activities prior to the commencement of the present action, this single interlocking directorship involving Kress, now terminated, shows no propensity of Kress's towards allowing interlocking directorships that would make a renewal of the alleged violation of Section 8 likely. Section 8 was enacted in 1914 and there are no reported cases on that section that would indicate under what circumstances two corporations are competing so that the elimination of competition between them constitutes violation of the Anti-Trust Law. That it was doubtful whether Hancock's membership on the Kress Board violated Section 8 is manifest by the fact that Hancock and his attorneys discussed the matter for five years with the Department of Justice before this action was commenced (R. 20, 21). During all this time the Department of Justice never approached Kress and stated that it considered Hancock's membership on the Kress Board a violation of Section 8 or requested that Kress do anything about it (R. 17). Very shortly after the Department made its position known to Kress by the commencement of this suit Hancock resigned from the Kress Board (R. 20) and thereafter Kress's directors reduced their number by one and at the subsequent shareholders' meeting the shareholders elected a new Board which did not include Hancock (R. 24, 25). Surely this single instance of an interlocking directorship that may have been in violation of Section 8 which has ceased with assurances against its renewal shows no propensity of Kress's to violate Section 8.

In view of the foregoing, it is quite evident that no threat of future violation of Section 8 is shown. The foregoing facts rather show an intent to comply with the Government's wishes in so far as possible. Hancock's state-

ment that he does not intend to go back on Kress's Board, the sincerity of which has never been questioned, is assurance that the interlocking directorship, allegedly in violation of Section 8 of the Clayton Act, will not be resumed. Kress and Hancock are not free to have Hancock on Kress's Board in violation of Section 8. There being no threat of a repetition of the activities complained of, the present case clearly falls within the principle of *United States* v. *Hamburg-American Co.*, 239 U. S. 466, *Standard Oil Co.* v. *United States*, 283 U. S. 163, 181 and *Walling* v. *T. Buettner & Co.*, 133 Fed. 2d 396 (CA 7th), cert. den. 319 U. S. 771.

Even if the situation after the cessation of the allegedly prohibited activity is such that the case is not rendered moot, it is for the District Court in its discretion to decide whether there is a sufficient threat of renewal of the prohibited activity to require the issuance of an injunction. *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U. S. 419, 421. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 331. Judge Conger of the District Court decided that there was not the slightest threat that the defendants would attempt any future activity in violation of Section 8 and dismissed the suit. This decision was properly within his discretion and should be affirmed.

(B) The case is not continued in controversy by reason of the fact that the Government has asked for relief broader than that to which it is entitled and which it has received.

The pleadings and the Government's argument indicate that the Government is not so much concerned with the resumption of the alleged violation of Section 8 in the present case as it is with interpretation of Section 8 for use as a future authority. This case does not present a situation with any likelihood that the shareholders of Kress will deliberately elect Hancock to its Board, in violation of Section 8. As we have pointed out, Hancock's

directorship on Kress's Board has ceased, in good faith, with assurance against renewal.

The Government contends that it has not gotten full relief because it has also requested a decree "1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act" and "5. That the defendants Grant and Kress each be perpetually enjoined from permitting to be elected or allowing to serve as a director any person who is at the same time a director of a competitor corporation engaged in interstate commerce" (R. 3, 4.). The Government is not entitled to this relief and its request for it cannot create a justiciable controversy.

Even assuming that Kress could refuse to permit the election of a director by its shareholders, or prevent a duly elected director from serving, both of which questions will be discussed in Point II of this brief, there is no indication in the record that there has been any alleged violation or threatened violation of Section 8 by Kress other than Hancock's directorship. The Government's Interrogatories of thirty detailed questions are concerned only with Kress and its relationship to Hancock and Grant. Although Hancock's affidavit shows that the Department of Justice has been considering this matter for at least five years, the Government did not submit any affidavits opposing the motion in the District Court. It is quite apparent, therefore, that the Government has no reason to believe or fear any violation of Section 8 by Kress other than that specifically alleged in the complaint, which has ceased. The only possible purpose for the broad relief requested with respect to Grant and Kress is to get a court interpretation of Section 8 for authority in other cases involving other parties, or to hold a club over Kress's head in case its shareholders, like those of any other corporation which is the subject of the limitations of Section 8, might some day unwittingly elect a director that the Government would consider ineligible because of that statute.

In view of the fact that the Government has, by voluntary acts of the parties hereto, gotten full relief from all the acts complained of, it has no right to the very broad and vague relief requested in the prayer for relief directed to possible future violations by Kress.

In summarizing the principles applicable to the scope of an allowable injunction, the Court said, citing applicable authorities, in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409-410:

> "The applicable principles are not doubtful. The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed or that the court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable. But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' * * *"

Even if the Government had sought an injunction prohibiting Kress from violating Section 8 in any way, it

would not have requested relief as broad as that contained in its fifth prayer for relief, wherein it seeks to prevent the election to Kress's Board of "any person who is at the same time a director of a competitor corporation engaged in interstate commerce" (R. 4.). The very statute upon which this request for relief is based is narrower than the relief requested. The statute provides that no person at the same time shall be a director of two competitor corporations, competing in such a manner "that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." (Section 8, Clayton Act, 15 U. S. C., Sec. 19.) The Government chooses to ignore the statutory limitation above quoted, on the theory that it has no meaning. There is no presently eixsting violation of Section 8 and no violation other than that which has been discontinued has been alleged. If the Government's prayer for relief were granted, it would mean that Kress must hold its shareholders' meetings under the shadow of a decree so broad and vague that certain interpretation of it is impossible.

Compare the decree requested by the Government with those described in page 22 of the Government's brief. Each of the decrees described in the Government's brief is an order directed to a definite act. There can be no question as to whether the defendants were, or were not, violating such decrees. For example, those decrees ordered that certain combinations were to be dissolved; certain segments of a business were to be divested; the voting of certain stock was prohibited; and certain patents were to be licensed or sold. In the present case, on the other hand, the decree that the Government wants is not to prohibit Kress from allowing its shareholders to elect to its Board certain named individuals as directors, or individuals of certain named definite companies. The only test provided by the requested decree is that the shareholders must not

be allowed to elect persons who are directors of a competitor in interstate commerce. What companies are competitors of Kress in interstate commerce? What degree of competition is necessary? Must they be retail chain stores? Is it sufficient that both companies have a store located in the same state? How many items must they handle in common before they are competing? Must the items be in the same price range? These, of course, are only a sample of the many detailed questions involved in deciding whether a given person is eligible for directorship on Kress's Board under the terms of the decree proposed by the Government. The difficulty of answering some of these questions is illustrated by one of the companion cases on this appeal and another case that is currently pending in the District Court. In these two cases, Sears, Roebuck & Co., a large mail order house, is alleged to be competing with Bond Stores, a clothing store chain (*United States of America* v. *Sears, Roebuck & Co., Bond Stores, Inc. and John Hancock*, Civil Action 73-297, S. D. New York) and with Goodrich Tire & Rubber Company, a manufacturer of rubber goods (*United States of America* v. *Sears, Roebuck & Co., Goodrich Tire and Rubber Company and Sidney G. Weinberg*, S. D. N. Y. Civil Action 73-293). If the Government succeeds in obtaining the relief it requests, Kress's shareholders must answer these questions at their peril or Kress will be in contempt of court.

The Government cites *International Salt Co.* v. *United States*, 332 U. S. 392, 401; *United States* v. *National Lead Co.*, 332 U. S. 319, 335; and *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88, for the proposition that it is entitled to a broad decree enjoining all possible violations of Section 8 by Kress. These cases involve complicated situations in which broad provisions of the antitrust laws were violated. The cases held that, inasmuch as an injunction against the specific activity complained of would not prevent other ways of achieving the restraint of trade com-

plained of, the Court would be permitted to close all the usual avenues of achieving the same result. Thus, this Court said in the *International Salt Co.* case:

> "* * * The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention. And it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur." *International Salt Co.* v. *United States*, 332 U. S. 392, 400.

In the present case, no such situation is presented to the Court. The statute involved prohibits a certain specific thing, namely, a directorship. Once the directorship has been enjoined or otherwise terminated, the violation of the statute ceases, and there are no other avenues by which the violation can be renewed. So, if the case were not moot and if Kress and Grant are competing in a manner described in Section 8, the Government would be entitled to a decree prohibiting Kress from allowing Hancock to be elected to its Board while he is also a director of Grant (assuming, of course, that Kress could prohibit such an election). It is quite another thing to prohibit Kress from

allowing to serve on its Board any person who is a director of any competitor. The determination of whether Kress and Grant are competing in the manner described in Section 8 is based on the examination of the detailed workings of their businesses. These details have no bearing on the question of whether the director of a third company is eligible to serve on Kress's Board; that would be an entirely different case and should be decided on its own merits. The only bearing that the present case would have on it would be that both are violations of the same statute and the present case would be legal authority.

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426, cited by the Government for the proposition that unlawful acts related to that found to have been committed can be enjoined, involved an order of the National Labor Relations Board that ordered the defendant, not only to cease and desist from refusing to bargain collectively with the union, but also to cease and desist from interfering with or coercing its employees in their rights to self organization and other rights guaranteed by Section 7 of the National Labor Relations Act. This Court said that in view of the fact that the only wrong shown was refusal to bargain, an appropriate order would be limited to restraining the refusal to bargain or other acts interfering with the union's efforts to negotiate. The "related" acts that could be prohibited were limited to those relating to the violation found to exist. They could not include other violations of the statute.

If the Government should succeed in obtaining its injunction prohibiting Kress from allowing to serve on its Board of Directors a person who is a director of a competitor, Kress's shareholders would be virtually limited in their selection of candidates for its Board of Directors to persons who were directors of no other company, or risk a possible contempt of court violation. This would amount to adding a penalty of contempt of court for all violations

of Section 8 by Kress, which is clearly beyond a court's power. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409.

Since the relief requested by the Government is broader than that to which it is entitled, it cannot be heard to argue that the instant case is not moot on the ground that it is entitled to this broader relief.

It is apparent that the Government's purpose in continuing this suit after it has obtained the termination of the interlocking directorship complained of, is to create a legal precedent for use in other cases involving other parties. The act prohibited by Section 8 is a simple one—the election of a director—but the question of whether the election of a given director violates Section 8 is vastly more complicated. It requires the determination of the question of whether Kress and Grant are competitors of the kind described in Section 8. A trial of this issue promises to be a long and drawn out one. The interrogatories addressed to Kress go into minute detail concerning every item carried in all of Kress's stores (R. 8-11). This Court can take judicial notice of the fact that a chain of retail variety stores carries a very large number of items, and the cost and expenditure of time and money in the answering of these interrogatories alone would be very burdensome to Kress. Surely, the Government cannot force Kress and the other defendants to litigate this case, at a large expenditure of the Court's time and of time and money of the defendants, when the defendants are all perfectly willing to comply with the Government's wishes and are doing so at the present time. The fact that the Government may want authority for another case does not give the Court jurisdiction of the case. In the words of Mr. Chief Justice Vinson:

> "But whatever the practice in Wisconsin Courts, 'A Federal Court is without power to decide moot questions or to give advisory opinions which cannot effect

the rights of the litigants in the case before it' [cases cited].' *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943)." *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416, 418.

Since the interlocking directorship alleged to be in violation of Section 8 has ceased without a threat of future violation, the Government has all the relief to which it is entitled and any further consideration of the case would be consideration of moot questions and it follows that the complaint was properly dismissed.

POINT II

Section 8 is not directed to Kress and the complaint should be dismissed in so far as it seeks relief against Kress.

In the District Court Kress argued not only that this case is moot, but also that Section 8 has no applicability to corporations, and that the complaint should therefore be dismissed as against Kress. Judge Conger found it unnecessary to decide this latter question in view of the fact that the case had become moot.

The Government seeks to enjoin not only the director, Hancock, but also the two corporations of which he was a director, Kress and Grant. It asks that it be decreed that the corporations have violated Section 8; that the corporations be compelled to accept Hancock's resignation; and that they be enjoined from permitting him or any other person who is a director of a competitor from being a director or allowing him to serve as a director (R. 3-4).

Section 8, pursuant to which this relief was sought, provides in part:

"No person at the same time shall be a director in any two or more corporations * * * The eligibility

of a director under the foregoing provision shall be determined by the aggregate amount of the capital * * *." Section 8, Clayton Act, 15 U. S. C., Sec. 19.

This provision is quite clearly aimed at the person who is the interlocking director, not at the corporation of which he is a director. In keeping with the general purposes of the Clayton Act, Section 8 is designed to prohibit a specific means of concentrating wealth in the hands of an individual by reason of his common directorships in a number of corporations. The pertinent part of the report of the Judiciary Committee of the House of Representatives on this paragraph of Section 8 is as follows:

"The third paragraph of Section 9 deals with the eligibility of directors in industrial corporations engaged in commerce, and provides that no person at the same time shall be a director in any two or more corporations * * *. The importance of the legislation embodied in section 9 of this bill cannot be overestimated. The concentration of wealth, money and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions. The idea that there are only a few men in any of our great corporations and industries who are capable of handling the affairs of the same is contrary to the spirit of our institutions. From an economic point of view, it is not possible that one individual, however capable, acting as a director in fifty corporations, can render as efficient and valuable service in directing the affairs of the several corporations under his control as can fifty capable men acting as single directors and devoting their entire time to directing the affairs of one of such corpora-

tions. The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system for which he acts, which usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he dominates by reason of his prestige as a director and to the detriment of the public generally.

"As the President has well said in his message, the adoption of the provisions of this section will bring new men, new energies, new spirit of incentive, and new blood into the management of our business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitle them to direct. It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country." Report No. 627, Part 1, of the Judiciary Committee of the House of Representatives to accompany H. R. 15657 to amend the Sherman Act, 63rd Congress, Second Session, pages 19 and 20.

Congress clearly intended Section 8 (referred to in the above quotation as Section 9) to deal with a specific kind of evil, namely, the concentration of power in the hands of an individual by means of common directorships and was not intended to prevent combinations by corporations. Combinations by corporations are prohibited by other provisions of the antitrust laws. The qualification in the statute that the corporations be "competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws" Section 8, Clayton Act, 15 U. S. C., Sec. 19) was inserted as a test to determine whether the directorship itself violated the terms of Section 8. It was the directorship that was considered by

Congress as a means of eliminating competition. Congress had no thought of a possible violation of Section 8 by the Corporation.

The very nature of the prohibition in Section 8 makes it necessary that Section 8 should direct itself only to the individual who is a director and not to the corporations of which he is a director. The election of a director is not a corporate function; the corporation has no control over the election of its directors. The election of a director is effected by the individual who stands for election as a director and the shareholders of the corporation who elect him.

Kress is a New York corporation (R.-1). The election of directors is not enumerated among the powers of a New York corporation. *New York General Corporation Law, Sec. 14.* The election of directors is the inalienable right of the holders of the voting stock and cannot be taken away from them by its directors or officers. *New York Stock Corporation Law, Sections 47 and 55; Lord* v. *Equitable Life Assurance Society,* 194 N. Y. 212; *Stokes* v. *Continenetal Trust Company,* 186 N. Y. 285, 295, 296. It follows, of course, that directors of a corporation cannot remove one of their number. See *Matter of Buckley,* 183 Misc. 189, 191.

A corporation acts by its directors, who are its managers, through such officers and agents as they appoint. *New York General Corporation Law, Secs. 14 and 27.* Any order or injunction directed to a corporation is, therefore, directed to its directors or officers. It follows that no order directed to a corporation can prohibit the election of directors, since that is not within the corporate powers. Such an order must be directed to the shareholders since it will affect their inalienable right.

In *General Investment Co.* v. *Lake Shore Railway,* 260 U. S. 261, the plaintiffs there sought to enjoin a share-

holder who was not a party to that proceeding from voting its stock in a certain way, or to enjoin the corporation from permitting the stock to be so voted. The Court said, at page 285 to page 286:

> *"Was the New York Central Company an indispensable party?*
>
> "As to so much of the bill as sought to enjoin the New York Central Company from voting its shares in the Lake Shore Company and to enjoin the latter from permitting it to vote them, we think it is obvious that the New York Central Company was an indispensable party, and that with it neither appearing nor reached by any effective process no other course was open than to dismiss that part of the bill. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 246; *Taylor & Co.* v. *Southern Pacific Co.*, 122 Fed. 147, 152, 154.
>
> "As to so much of the bill as sought to enjoin the Lake Shore Company from entering or consummating the proposed consolidation, the New York Central Company plainly was not an indispensable party. Its stockholding interest in the Lake Shore Company did not make its presence essential, its status in this regard being merely that of the stockholders in general. Nor did its participation in the agreement for the consolidation give it any right which required that it be brought in. At best the agreement was not to be effective unless and until ratified by the stockholders of the several companies. It had not been ratified by the stockholders of the Lake Shore Company and they were under no obligation to ratify it."

See also *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 245.

Since the election or non-election of a specific director is not within its corporate powers, and since its shareholder-

ers are necessary parties to any order involving their right to elect a director, Kress cannot be ordered in the present action to prevent the election of a specific director or class of directors.

The difference between a statute directed to corporate action and one not so directed as illustrated by a comparison of Section 10 of the Clayton Act (15 U. S. C.; Sec. 20) with Section 8.

The pertinent parts of Section 10 are as follows:

> "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except * * *" 15 U. S. C. Sec. 20.

Section 10 prohibits certain corporate acts on the part of corporations who have interlocking directors. Quite clearly, the corporation could, and would, be enjoined from violating this section. In comparison, corporations cannot be prohibited from violating Section 8 because there is no corporate act prohibited by Section 8.

The Government recognizes the limitations of the corporate power because it does not ask that Kress fire its director or relieve him from office. It merely requests that Kress accept Hancock's resignation and that it be enjoined from permitting to be elected or allowing to serve on its

Board of Directors Hancock or any person who is also a director of a competitor. The Government can get its complete relief by its control over the director. The director is free to resign from the Company without the concurrence of or acceptance by the corporation. *Briggs* v. *Spaulding*, 141 U. S. 132, 154. He cannot be required to serve as a director against his will. *Ehret* v. *Ringler & Co.*, 70 Misc. 627, reversed on other grounds, 144 App. Div. 480, appeal dismissed, 204 N. Y. 638; *Fearing* v. *Glenn*, 73 Fed. 116; White, *New York Corporation* (12 Ed.), Sec. 27, par. 38. See *Olmstead* v. *Dennis*, 77 N. Y. 378, 387 (Drainage Commissioners).

Since the election and resignation of a director are completely beyond the control of the corporation and its directors, and there is no legal way in which the corporation can prevent the election of a director by the shareholders, or prevent the taking of office by a director duly elected by the shareholders, Section 8 cannot be directed to the corporations.

There is good reason why the burden of preventing violations of Section 8 should be placed on the interlocking director alone. He is the connecting link that creates the interlock that is prohibited and he is the one who has knowledge of the facts and who is in a position to know whether his directorship creates an interlock that violates Section 8. He knows the corporations on whose Boards of Directors he sits. He also knows the details of their business so that he can best determine whether the corporations are competing in the manner described in Section 8. In contrast, the average shareholder in a large corporation knows little about the corporation's directors and probably nothing about other corporations with which his corporation may have common directors. It would place an unreasonable burden on a shareholder to require him to have such knowledge and act intelligently on it.

Even if the shareholders of each corporation could inform themselves of all the details necessary to determine whether a prohibited interlock would exist by the election of a certain director, there must always be one corporation whose shareholders elect their directors before any prohibited interlock exists. Suppose the Government should get a decree herein enjoining Kress from allowing to serve on its Board any person who is a director of a competing corporation and Kress's shareholders at their annual meeting elect as a director a person who holds no other directorship. Suppose that a week later the same person is elected to the board of a competing corporation, Kress would then be in contempt of court during the remaining term of office of its director. This would quite obviously be unjust and unfair to Kress.

The Government argues that the corporations must, nevertheless, be parties hereto and that a decree can be directed against them. It argues that Section 11 of the Clayton Act (15 U. S. C., Supp. V, Sec. 21) empowers the Federal Trade Commission to order a corporation to rid itself of a director and that it follows therefrom that the courts, although not specifically authorized to do so, may also order a corporation to rid itself of a director. The pertinent part of Section 11 reads as follows:

> "* * * If upon such hearing the Commissioner or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated * * * and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order." Section 11 of the Clayton Act, 15 U. S. C., Supp. V, Sec. 21.

The Government points out that elsewhere in the Clayton Act the word "person" is defined to include a corporation.

The Government has not, however, asked that Kress be required to rid itself of Hancock. Hancock is no longer on Kress's Board. It has asked that Kress prevent the election or taking of office of a director whose presence on Kress's Board would violate Section 8. How will Kress prevent the election of an ineligible director by a group of people over which it has no control, and how can it prevent a duly elected director from taking office? If the Government should obtain its decree, Kress would be in contempt of court if an ineligible person were elected, no matter how hard it had tried to prevent the election.

Neither Section 8 nor Section 11, nor any other section of the Clayton Act puts any duty on the corporation to prevent a violation of Section 8. In fact, Congress would have no power to enact a statute requiring a corporation to prevent the happening of an act which is beyond its control to prevent. Such a statute would clearly violate the Fifth Amendment of the Constitution (U. S. Const., Amendment V) as a deprivation of property without due process of law. Congress could perhaps have required the corporation to take certain definite steps which it deemed advisable as a measure that might tend to prevent the possibility of violations of Section 8, but it has not chosen to do so. Quite obviously neither the Court nor the Federal Trade Commission can order Kress to prevent the election of a director by a group of people over which it has no control.

It does not necessarily follow that the above quoted provisions of Section 11 are unconstitutional in part. It should be noted that Section 11 does not empower the Federal Trade Commission to order a "corporation" to divest itself of a director. It does empower the Federal Trade Commission to order a "person" to divest itself of a director. A person can be a corporation by definition, but there are other persons than corporations—share-

holders, for example. It would probably be lawful for the Federal Trade Commission to order shareholders of a corporation to divest themselves of an ineligible director, since that is within their powers to do.

Therefore, if the Government is entitled to relief against any future interlocking directorates in this action, it must seek it against the director involved and not against the corporations. It can get its full relief by an injunction directed to the director. He could not be elected to the board of one of the corporations if he did not stand for election. It follows that the complaint was properly dismissed by the District Court in so far as it seeks relief against the corporation, regardless of whether or not the case is moot.

Conclusion

The judgment of the District Court dismissing the complaints herein was correct and should be affirmed.

In any event, the judgment of the District Court should be affirmed in so far as it dismissed the complaint against defendant Kress.

Dated, New York, N. Y., April, 1953.

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